

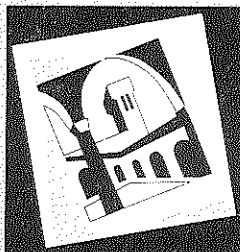
Robert Schuman Centre
for Advanced Studies

Mirror, Mirror on the Wall...
Who's the Fairest of Them All?
The Double Logic in the Imposition of
JHA Instruments of Control on
Candidate Countries

MONICA DEN BOER

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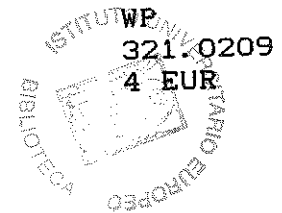
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den Boer: *Mirror, Mirror on the Wall... Who's the Fairest of Them All? The Double Logic in the Imposition of JHA Instruments of Control on Candidate Countries*

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

ROBERT SCHUMAN CENTRE
FOR ADVANCED STUDIES



**Mirror, Mirror on the Wall... Who's the Fairest of Them All?
The Double Logic in the Imposition of JHA Instruments of
Control on Candidate Countries**

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This paper was written for a meeting of the Reflection Group on the Diversity and Unity in the Enlarged European Union, set up jointly by the Robert Schuman Centre and the Group of Advisors at the European Commission, and chaired by Professor Jean-Luc Dehaene. The European University Institute and the Robert Schuman Centre are not responsible for the proposals and opinions expressed by the author. For information on this and other projects on Eastern Europe at the Robert Schuman Centre, please contact Professor Jan Zielonka (zielonka@datacomm.iue.it).

Introduction*

The development of the Area of Freedom, Security and Justice (AFSJ) within the European Union (EU) has followed a remarkably capricious pattern. As a relatively new policy domain within the EU, it has been approached with caution and suspicion by politicians in the member states, who have implicitly or explicitly expressed resentment at relinquishing national control in sovereignty-sensitive areas, such as immigration and asylum control, police and judicial co-operation, and the fight against transnational organised crime, fraud and corruption. On the other hand, national politicians have embraced the construction of the AFSJ as an opportunity to turn the EU into a joint internal security enterprise which should bring the EU closer to the citizens of Europe. The latter approach has emerged particularly since the special Council Summit which was convened in Tampere during the Finnish Presidency and which was solely developed to Justice and Home Affairs (JHA) cooperation. The institutionalisation trend which was reinforced at the Tampere summit – particularly through the endorsement of the creation of Eurojust and the European Police College – has however been fettered by nested games and bargaining processes.

The objective of the underlying paper is to look at aspects of this two-folded process, in particular in view of the incumbent enlargement of the EU. The JHA Chapter constitutes a formidable hurdle¹ for candidate countries, as it demands not merely the assimilation of legal provisions (Title IV TEU, Title VI TEU and the Schengen *acquis*) into the respective domestic laws, but also revision - if not reform - of national institutions (police, customs, public prosecution, judiciary) and instruments of control (border control, data exchange systems, etc.). Except for this magnificent challenge, the candidate countries are faced with the necessity to implement the relevant legal provisions at once. This applies in particular in view of the Schengen *acquis*: no transitory periods in the field of JHA are in principle allowed for the new member states, as they are required to satisfy the requirements of the *acquis* at the moment of their accession. Specific rules concerning the implementation and abolition of the internal border controls will be regulated in the Accession Treaties. The

* Paper commissioned for the Reflection Group on "Diversity and Unity in the Enlarged European Union: What Influences the Process of Transition and Adaptation in Central and East Europe?", Chaired by Jean-Luc Dehaene, 21-22 June, Brussels.

¹ Monica den Boer and Gilles de Kerchove, "A Hurdled Admission: The Integration of the Candidate Countries into the Area of Freedom, Security and Justice", in Vincent Kronenberger (Ed.), *The European Union and the International Legal Order – Discord and Harmony*, The Hague, T.M.C. Asser Institute, 2001, pp. 315-329; see also –specifically in relation to policing – Frank Gregory, "Good Cops": *Issues related to EU Enlargement and the "Police" Requirements of the JHA acquis*, Working Paper 24/01, "One Europe or Several?", ESRC Research Programme, on p. 6.

effective implementation of the requirements of the *acquis* will be verified before the completion of the relevant Accession Treaty negotiations or at the latest before the ratification of the Accession Treaty concerned.

The crux in the debate about these requirements is whether they can be considered fair and consistent when practices are compared between the evolution of JHA between the current EU member states and the imposition of instruments of control on the new member states. One of the most pertinent differences is that within the current circle of member states, a great deal of flexibility has been allowed (and sometimes even encouraged!), whilst none of that flexibility seems to be allowed vis-à-vis the new member states. In discussing these apparent double standards², we will first undertake an excursion into past and actual practice within the Schengen area, and then move on to a more general analysis of JHA.

One of the principal objectives of this working paper is to explore the application of flexibility in the application and implementation of the Schengen *acquis*, and more widely of the JHA *acquis*, by the candidate countries. Although generally the dominant assumption (still) is that enlargement will follow the "big bang" procedure, alias simultaneous accession by all candidates minus Romania and Bulgaria, there are increasingly strong voices to be heard that accession should perhaps follow a more flexible path – particularly also in the field of internal security. The principal argument of this paper is that whilst multi-speed integration in the Schengen-regime may be costly, time-consuming³, technically awkward⁴ and politically sensitive, from a perspective of precedent, pragmatism, fairness and symmetry it may be the most viable solution to go forward.

² Summary of report entitled *The Long-Term Implications of EU Enlargement: The Nature of the New Border*, Final Report of the Reflection Group, Chairman Giuliano Amato, Rapporteur Judy Batt, The Robert Schuman Centre for Advanced Studies (European University Institute) with the Forward Studies Unit (European Commission), on p. 5. See also p. 57 and 58: "On the one hand, the EU – quite rightly – expects quite high standards in the field of human rights and the treatment of refugees on the part of prospective new member states. On the other hand, ... (T)he pressures to toughen up controls and policing on the eastern borders are hard to reconcile with the EU's declared aim of promoting democratic and liberal administrative practices in Central and Eastern Europe."

³ Malcolm Anderson, "The Transformation of Border Controls: A European Precedent?", Extract from P. Andreas and T. Snyder (eds.), *The Wall around the West: State Borders and Immigration Controls in North America and Europe*, Rowman and Littlefield, 2001.

⁴ Centre for European Reform (CER), Brussels, June 20, 2001 (Reuters).

Flexibility in the Schengen Area⁵

The Schengen *acquis* was incorporated into the framework of the European Union when the Treaty on European Union (TEU) entered into force on 1 May 1999. The absorption of the free movement of persons' laboratory into the TEU heralded the provisional ending of a dual legal, institutional and political trajectory⁶. Until the moment of incorporation, a majority of 13 EU Member States⁷ had jointly paved the way for reinforced cooperation in multiple areas, such as external borders control, asylum policy, and police and justice cooperation in criminal matters. Article 18 of the EC Treaty (TEC) lays the foundation for the realisation of a free movement of persons area, which is extended with a series of flanking measures intended to compensate for the abolition of internal border controls.

The incorporation of the Schengen *acquis* was accompanied by a partial communitarisation process, in which some elements of the previous Title VI were lifted to the new Title IV TEU. This Title, entitled "Visas, Asylum, Immigration and other Policies related to the Free Movement of Goods", is an integral part of the progressive establishment of an AFSJ. Measures pertaining to the abolition of internal border controls, external borders, visa policy, asylum, refugees, immigration policy, legally resident third country nationals, and judicial cooperation in civil matters now form part of EC law.

From the outset, Schengen was launched as a temporary initiative in order to test a common framework of internal security control and to gradually expand this framework to the whole European Community. Only in the final stages of the IGC-negotiations before the Amsterdam summit, the proposal was launched to integrate Schengen into the EU-framework. This integration was meant to bring an end to the undesirable external institutional, political and legal existence outside the European Union.⁸ Despite the fact that the Schengen *acquis* was brought within the framework of the EU, a colourful integration pattern has emerged which bears a striking resemblance to the 'variable

⁵ This section draws heavily on my paper entitled *To What Extent Can There Be Flexibility in the Application of the New Member States?*, which was presented at the CEPS/SITRA/Stefan Batory conference "New European Borders and Security Cooperation: Promoting Trust in an Enlarged European Union", Brussels, 6 and 7 July 2001.

⁶ See e.g. Monica den Boer and Laura Corrado, "For the Record or Off the Record: Comments About the Incorporation of Schengen into the EU", *European Journal of Migration and Law*, 1999, Volume 1, No. 4, 397-418.

⁷ All EU Member States with the exception of the United Kingdom and Ireland.

⁸ Monica den Boer, "The Incorporation of Schengen into the TEU: A Bridge Too Far?", in Jörg Monar and Wolfgang Wessels (Eds.), *The Treaty of Amsterdam: Challenges and Opportunities for the European Union*, London, Continuum, 2000, pp. 297-319.

geometry' model of flexibility.⁹ Within the AFSJ, five different configurations of countries can currently be distinguished:

- EU member states committed to creating an AFSJ minus the EU member states that negotiated an opt-out with respect to Title IV TEC (United Kingdom, Ireland and Denmark);¹⁰
- 13 EU member states that signed the Schengen Agreements and thus constitute the core group that jointly developed the Schengen *acquis*;¹¹
- The same 13 EU member states plus the two associated members Iceland and Norway¹², who together with the United Kingdom and Ireland form the so-called Mixed Committee;¹³

⁹ Helen Wallace notes that "Bundled together in the vocabulary of flexibility were: changes in the context and conditions for integration; variations in the objectives of the actors involved; differences in the interests of the actors; controversies about which values and norms should be embedded in the process; debates about the feasible and desirable policy scope for shared regimes; and questioning of the institutional rules and practices through which to develop policy regimes.", in "Flexibility: A Tool of Integration of a Restraint on Disintegration?", in Karlheinz Neunreither and Antje Wiener (Eds.), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy*, Oxford, Oxford University Press, 2000, pp. 175-191, at p. 178. See also: Alexander C.-G. Stubb, 'A Categorization of Differentiated Integration', *Journal of Common Market Studies*, 1996, Vol. 34, No. 2, pp. 283-295; Geoffrey Edwards and Eric Philippart, *Flexibility and the Treaty of Amsterdam: Europe's New Byzantium?*, Cambridge, CEKS Occasional Paper, No. 3, November 1997; Gilles de Kerchove, 'Un espace de liberté, de sécurité et de justice aux dimensions incertaines: Quelques réflexions sur le recours aux coopérations renforcées en matière de justice et d'affaires intérieures', in *Coping with Flexibility and Legitimacy after Amsterdam*, Monica den Boer, Alain Guggenbühl, Sophie Vanhoonacker (Eds.), Maastricht, EIPA, 1998 pp 197-204.

¹⁰ Title IV TEC, Article 69: 'The application of this Title shall be subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark and without prejudice to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland'; Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and Ireland; Protocol on the Position of the United Kingdom and Ireland.

¹¹ The Schengen *acquis* as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999, OJ L 239, 22 September 2000, p.1. The Schengen *acquis* consists of the following elements: Agreement signed in Schengen on 14 June 1985; Implementation Convention signed in Schengen on 19 June 1990; Accession Protocols and Agreements; and Decisions and declarations adopted by the Executive Committee as well as acts adopted by the organs upon which it has conferred decision making powers.

¹² Application de l'acquis de Schengen dans les pays nordiques à partir du 25 mars 2001, doc. 6229/01 SCH/EVAL 11 COMIX 121, 26.02.01, Conseil AG (2331ème) pt. A14.

¹³ See: OJ L 176/31, 10.7.99, Council Decision of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*; OJ C

- The 13 "Schengen" EU Member States together with the partial participants (UK, Ireland) who requested an opt-in with respect to certain elements of the Schengen *acquis*;¹⁴
- Last but not least, the group of States that are awaiting accession to the EU and which will have to implement the Schengen *acquis*.¹⁵

Except for the various configurations of EU-Member States, non EU Member States and applicant countries, various forms of flexibility are being applied to areas of internal security, such as:

- Gradual lifting of border controls upon accession to Schengen, e.g. first land borders, followed by airports and maritime controls;
- Different arrangements for operational law enforcement action in foreign territory, of the Schengen partner (for instance different geographical penetration zones in the context of 'hot pursuit');
- Article 2 -2 the Schengen Implementing Convention, which provides the temporary re-establishment of internal border controls when the internal security of a Schengen partner state is at stake;
- Opt-in which allows a partial participation in the Schengen *acquis*; the UK and Ireland will do this *without* relinquishing their internal border controls.

The evolution of the Schengen-regime is riddled with diverse forms of antagonism, and alternating discourses of trust and distrust¹⁶. The period which

211/9, 23.7.99, Council decision of 17 May 1999 on the conclusion of the Agreement with the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*; OJ L 176, 10.7.1999, pp 35-52, Council decision No 1/1999 of the EU/Iceland and Norway Mixed Committee established by the agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association in the implementation, application and development of the Schengen *acquis* of 29 June 1999 adopting its Rules of Procedure; OJ C 211, 23.7.1999, pp 9-11.

¹⁴ Council decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*; OJ L131, 1.6.2000, pp 43-47.

¹⁵ Protocol integrating the Schengen *acquis* into the Framework of the European Union (Protocol to the TEU, 1997). Article 8 of this protocol provides that: "For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all States candidates for admission". The scope of the requirement spelled out in this provision is somewhat unclear. It might mean that the full implementation of the Schengen *acquis* is no longer a pre-condition for the abolition of checks on persons at the internal borders but a precondition for accession to the European Union.

was leading up to the entry into force of the Schengen system was marked by various vicissitudes, such as the spilling over of Algerian terrorism into France and the increase in the number of asylum seekers. There are various other examples too. One is the dismay which was expressed by one of the founding fathers of the European Communities - Italy - about not being involved in the first inner circle of Schengen partners, which was formed by France, Germany and the Benelux countries. Another example is the delay in the Schengen negotiations subsequent to the fall of the Berlin Wall, and the need to refurbish the security at the external border between the EU and Poland. Also within this category is the unilateral decision by the French Government to reinstall internal border controls between itself and Belgium and Luxembourg respectively, which was justified on the basis of concerns about the 'influx' of drugs from the Netherlands.¹⁷ And finally, a prime obstacle in the history of Schengen has been the difficulty to achieve sufficient confidence in each other's ability to guard the external borders on behalf of the other partners. Political concern was expressed in the Dutch parliament about the quality of Greece's external border controls when Greece signed up to the Schengen Convention. This concern - which also applied to Italy - was strongly fed by media images of ships swamped with would-be-immigrants from Turkey and Iraq, and which became building blocks in political argumentation; it resulted in postponement and stage-wise abolition of border controls in these countries. The list of misgivings can be extended with other items, such as discussions concerning the quality of each other's data-input into the Schengen Information System and the perceived weaknesses of some (illegal) immigration control systems.

The discourse of trust and distrust seems to have contributed to the tolerance of flexibility in the application of the Schengen regime. The strongest example of flexibility being allowed is the above mentioned opt-in protocol which was granted to the United Kingdom and Ireland. Recently, we have witnessed some instances of flexibility in the temporary intensification of internal security controls between the current Schengen partners. Examples include:

- The Netherlands introduced the temporary reinforcement of the expulsion policy by the Dutch border control authorities during the Euro 2000 championships¹⁸;
- Austria intensified its border controls for the period of a week between 1 and 3 July 2001, which hosted a world economic forum for Eastern Europe and suspended the Schengen Agreement to diminish a repetition of the riots in Gothenburg.¹⁹
- Italy temporarily suspended the Schengen Agreement when it hosted the G8-summit from 20 to 22 July 2001 in Genova.
- Following the events in Genova, the Danish police have demanded that the Danish government suspends the Schengen Convention and allows increased control at the Danish borders prior to the EU Summits which are to be held in Copenhagen during the Danish EU Presidency in the second half of 2002.²⁰

The lack of trust also seems to be a dominant feature in the enlargement process. Central and East Europeans have ventured some frustration about the lack of trust in their crime-fighting abilities, when it is not even that successful in the current member states of the EU.²¹ The management of trust should be embraced as one of the leading diplomatic strategies, particularly in view of the fact that also between the law enforcement agencies of the current member states trust is not sufficient to exchange intelligence on transnational organised crime via Europol. Trust-building in the domain of internal security could possibly benefit from increased trans-regional (law enforcement) co-operation²². But how does one strike a proper balance between the need for decentralised, transregional or

¹⁶ Neil Walker, *The Problem of Trust in an Enlarged Area of Freedom, Security and Justice: A Conceptual Analysis*, Paper presented at CEPS/SIIRA/Stefan Batory conference "New European Borders and Security Cooperation: Promoting Trust in an Enlarged European Union", Brussels, 6 and 7 July 2001.

¹⁷ Monsieur Paul Masson, Sénateur du Loiret, *Rapport sur la Convention d'Application de l'Accord de Schengen*, 31 janvier 1996.

¹⁸ Tweede Kamer, vergaderjaar 1999-2000, 26 227, nr. 29. EU-legislation prevented the possibility of immediate expulsion of EU-citizens after committing petty criminal offences; hence, the Dutch authorities decided to raise the expulsion limit to a sentence for a criminal fact with a 'threat penalty' of minimally 4 years. In this case, expulsion would apply to EU-citizens sentenced to paying a fine but at the same time having been sentenced to the 4 year penalty. As far as the temporary re-introduction of border controls was concerned (Article 2-2 Schengen Implementing Convention), the Dutch Royal Military Constabulary drafted a special scenario which tackled the factual border control at the border with Germany, airports and the North Sea coast.

¹⁹ *JAI in the News*, 29 June 2001.

²⁰ Copenhagen, Press Review, quoted in *JAI in the News*.

²¹ Remarks to this extent were raised during the discussion about the draft of this paper between the members of the Reflection Group.

²² See also the Commission White Paper on Governance: http://europa.eu.int/comm/governance/index_en.htm.

even tailor-made solutions and the need for standardised practices which are mutually recognised?

Implementation, Differentiation and Homogenisation in AFSJ between Current EU member states

The adoption and implementation of the impressive list of legal instruments (including conventions, joint actions, joint positions, framework decisions and decisions) confronts lawyers and policy officials in the candidate countries with a serious challenge, certainly when we realise that the implementation has to be done at once. This requirement contributes to the image that the EU Member States are neat performers when it concerns ratification and implementation of (binding) legal instruments.

That impression should however be avoided: specifically in Title VI, which is an intergovernmental arena of law-making, there is a tendency to conclude agreements which hold political value but which can be considered as legal compromises. Many of the instruments adopted by the JHA-Council are so-called 'soft instruments', such as recommendations or resolutions, and can thus not be regarded as enforceable within national legislation. Moreover, the binding legal instruments that are adopted often take several years before ratification is completed. None of the Title VI conventions concluded since the entry into force of the Maastricht Treaty has been fully ratified, with the exception of the Customs Information System Convention and the Europol Convention. The latter took 'only' three years between signature and ratification, but we should be mindful of the fact that this relatively short period was the outcome of forceful political pressure from both the Commission and the successive Presidencies. Following the Tampere summit in October 1999, the European Commission introduced a 'scoreboard'²³ which allows a regular inventory of the state of affairs concerning ratification and implementation. The scoreboard should introduce peer review and competition, but the Commission lacks incentives as no hard sanctions can be enforced in this intergovernmental area of policy-making. A major conclusion which can be drawn from this patchy pattern within the EU is that despite active lawmaking in the field of Justice and Home Affairs Co-operation, we are still far removed from harmonisation between national criminal justice systems in the current EU member states. This observation is not meant to encourage the candidate countries to sit back and

²³ http://europa.eu.int/comm/dgs/justice_home/pdf/com2001-278-nl.pdf; Commissie van de Europese Gemeenschappen, Mededeling van de Commissie aan de Raad and het Europees Parlement, *Halfjaarlijkse Bijwerking van het Scorebord van de vorderingen op het gebied van de totstandbrenging van een ruimte van "Vrijheid, Veiligheid en Rechtvaardigheid" in de Europese Unie (1e Halfjaar 2001)*, Brussel, 23.05.01, COM (2001) 278 definitief.

relax, but to place the implementation record of EU Member States in a more realistic perspective.

Another observation –already raised in the introduction – is that the evolution of the AFSJ is marred by ambivalence. On the one hand, we see a strong tendency towards differentiation strategies, which mainly come about because the speed of the integration is often determined by the most reluctant member states. This differentiation or heterogeneity is likely to increase with the expansion of EU membership.²⁴

Differentiation in AFSJ is paralleled by the pursuance of homogenisation strategies. The latter emerge in the form of politically persistent agenda's to achieve common standards and harmonisation throughout the whole EU. In particular the *Corpus Juris* project of the European Commission, with concrete proposals to establish a European Prosecutor with regard to the control of fraud and money-laundering against the European Community (a proposal that did not make it at the Nice summit), can be regarded as a longstanding political project which eventually aims at criminal law harmonisation and the establishment of a European Judicial Space. As far as asylum and migration are concerned, which have become policy issues falling under Community competence, there has also been a long-standing trajectory to establish a common asylum and immigration policy. The Belgian Presidency of the EU has made this also one of its priorities.²⁵

The pursuance of a common asylum and migration policy can be regarded as an inheritance of the Tampere summit, which approved an ambitious and detailed action programme that leading to the progressive establishment of a common area of freedom, security and justice. According to the Belgian Prime Minister Guy Verhofstadt, this must be an open area subject to controls based on the European principles of openness, freedom, hospitality, solidarity, non-discrimination, respect for human rights, human dignity and the values of a multicultural society. Where asylum is concerned, the emphasis will be on harmonising the procedures for granting asylum and on hosting refugees. At the same time, the principle to protect refugees must not be called into question. On the other hand, the Belgian Presidency argues that it is also important to achieve a fair distribution of the burden and to determine with accuracy which member state will be responsible for processing a given asylum application. Cynical observers may argue that the burden-sharing issue has been on the Justice and

²⁴ Helen Wallace, 2000, p. 185, referring to Wallace and Wallace, 1995.

²⁵ Speech by Prime Minister Guy Verhofstadt, "The Belgian Presidency of the European Union: Key Themes and Challenges", <http://www.eu2001.be/Main/Frameset.asp?reference=01-&lang=en&sess=1005514624&01&lang=en&sess=1005514624&>

Home Affairs agenda for nearly a decade, without, however, major political breakthroughs being achieved. Neither has the Dublin Asylum Convention been heralded as a great success. The Belgian Presidency will present the first progress report on a common asylum policy at the European Council in Laeken. As far as immigration is concerned, the Presidency aims to encourage the drafting of an overarching policy that takes account of the many facets of this issue: prevention and the development of partnerships with countries of origin, the management of migratory flows, integration and employment. Moreover, the Presidency has signalled that it is firmly committed to stepping up the fight against illegal immigration, especially with regard to the trafficking and trade in human beings.

Implementing the Schengen/JHA *acquis*: A Beauty Contest?

One of the questions that needs to be addressed is whether or not the ten countries currently queuing up for accession in 2004 (Estonia, Latvia, Lithuania, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Malta and Cyprus) are likely to achieve the standards of the Schengen / JHA regime. Significant demands are imposed on the candidate countries in terms of transposition and integration of the *acquis* into their domestic legal systems. In a special article devoted to the consequences of Schengen accession by the candidate countries, the *Oxford Analytica Brief*²⁶ mentions the following aspects:

1. *New external borders around the European Union*: Once the current 13 candidates have all joined – “if they all do” – the Union will gain further common borders with Russia and new borders with Belarus, Ukraine, Moldova, Croatia and Yugoslavia on the European continent. With the accession of Turkey, the Union would gain common borders with Georgia, Armenia, Azerbaijan, Iran, Iraq and Syria.
2. *Border Management systems*: Since EU candidates have to join the Schengen regime when acceding to the EU, they are responsible for ensuring tight control of their borders with third states, which will become external borders of the enlarged EU. The implementation of the Schengen *acquis* will generate problems on borders between candidates not acceding simultaneously. For instance, if the Czech Republic joins the EU before Slovakia, the interstate border will temporarily be an external one and require effective control; this prospect is sensitive as the two states of the former Czechoslovakia peacefully separated in 1993 and never seriously considered the establishment of controls at their common border. Another example is the border between Hungary and Romania. This common frontier will remain an external border for at least a few

years as Hungary's accession to the EU will be several years before that of Romania; in this case, the situation is complicated by the fact that Romania has a large ethnic Hungarian population (between 1 and 2 million people)²⁷. In addition, changes to border management with third countries will have logistical and socio-economic implications. Moreover, there is a sharp imbalance between the burden of controlling the external border in ‘front-line’ countries (e.g. Poland, Romania and Greece, as well as Turkey when/if it joins) and in ‘rearguard’ countries: some of the EU 15 will no longer have external land borders after enlargement (not will the Czech Republic, once Poland, Hungary and Slovakia have joined).

3. *Cultural shift*: Formerly, the East European states were not used to pressures of illegal immigration²⁸, trafficking in human beings and drug trafficking. They carried out “classical” border surveillance, generally using military means. The process of modernisation requires demilitarisation of border guards and a transformation into a professional border police service with civilian status and the introduction of new policing methods.
4. *Heavy investments*: Aligning the border management of the candidates to Schengen/EU standards requires heavy investments in human resources and equipment, such as modern devices for surveillance and communications. Substantial funds are dedicated to the realisation of this objective, e.g. through the Phare programme.
5. *The introduction of (new) socio-economic barriers*: Tighter border controls between the new EU members and third countries poses dilemmas (e.g. the erection of a barrier between Poland and Ukraine)²⁹,

²⁷ For the question of Hungarian minorities, see Judit Tóth, *The Application of JHA and the Position of Minorities – The Case of Hungarian Minorities*, presented at CEPS / SITRA / Stefan Batory Foundation Conference, Brussels, 6 and 7 July 2001; see also statistics presented by André Liebich, *Ethnic Minorities and the Long-Term Implications of EU Enlargement*, paper commissioned for the Reflection Group Amato, June 1998.

²⁸ For an elaborate account on the management of migration in the Baltic states, see: International Organisation for Migration, *Managing Migration in the Baltic States in the Framework of the EU Enlargement Process*, 2000 (<http://www.iom.int>).

²⁹ Germany believes that the movement of the Schengen frontier to the Polish/Ukrainian border should be delayed for 7 to 10 years. On the one hand, there is talk about “double perimeter defences”, in which case the German/Polish and the Polish/Ukrainian border would be hard frontiers and the Poles would fully implement Schengen (according to this scenario, if a Ukrainian wanted to enter Germany he/she would require a Polish visa and a Schengen visa and cross two hard borders); on the other hand, there is the scenario of the “canal lock system”, which would allow complete fluidity between Poland and the EU and between Poland and Ukraine; in this case, the Schengen frontier would remain at the German/Polish border and Poland would continue to implement the Schengen *acquis*. From: Introductory statement by Malcolm Anderson, *Policy Alternatives to Schengen Border Controls on the Future EU External Frontier, Proceedings of an Expert Seminar*, by Malcolm Anderson,

²⁶ 17 July 2001.

between Romania and Moldova, or the new border control regime that will apply to the Russian province and enclave Kaliningrad³⁰), which may strain bilateral links and economic ties. Some of these immediate drawbacks could be relieved by improved visa-processing.

Another challenge not to be trivialised is that the Title VI *acquis* is being developed at rapid speed. During the Swedish Presidency in the first half of 2001, 47 decisions alone were adopted by the Justice and Home Affairs Council.³¹ An important aspect of the EU re-accession strategy is that all candidate countries integrate the EU *acquis communautaire* into their domestic legal systems. To realise this undertaking, they are assisted by Accession Partnerships (AP's), which provide an assessment of the priorities and the financial support to achieve these priorities. At its summit at Santa Maria Da Feira in June 2000, the European Council observed that "progress in the (accession) negotiations depends on the incorporation by the candidate states of the *acquis* in their national legislation and especially in their capacity to effectively implement and enforce it." This includes indeed integration of the EU *acquis* in the field of Justice and Home Affairs Co-operation, which encompasses migration management issues such as asylum law and practice, external border management, visa policy and the combating of illegal trafficking in human beings.³² The Enlargement Strategy Paper of 2000 draws the attention to the following domains which are part of the chapter on Justice and Home Affairs co-operation, and that still require attention in most candidate countries:

- Public administration and the judiciary are to be modernised eq. strengthened, as they are of crucial importance in the implementation of the *acquis* and the transition process. Training of civil servants and judges needs to be sustained.
- Corruption is still seen as a major problem. It is assumed that this phenomenon is exacerbated by low salaries in the public sector and the

Joanna Apap and Christopher Mulkins, Warsaw, 23-24 February 2001, Organised by CEPS, Batory Foundation and co-financed by the SITRA Foundation, on p. 7 and 8.

³⁰ The questions surrounding Kaliningrad and the implementation of a visa regime is much discussed topic; see e.g. Anderson 2001, p. 15 and 16, *supra* note 29. See also Policy Papers 1, *Overcoming Alienation: Kaliningrad as a Russian Enclave Inside the European Union*, Stefan Batory Foundation, Warsaw, January 2001 (www.batory.org.pl); see also Olga Potemkina, *Russia's Engagement with the JHA and the Question of Mutual Trust*, at CEPS/SITRA/Stefan Batory conference, Brussels, 6 and 7 July 2001.

³¹ Lists of adopted Title VI instruments can be viewed at the site of the Council of the European Union; <http://ue.eu.int/jai/default.asp?lang=nl>

³² Ryszard Cholewinski, "Introduction", in International Organization for Migration (IOM), *Managing Migration in the Baltic States in the Framework of the EU Enlargement Process*, 2000, at p. 1.

use of extensive controls in the economy. Corruption, fraud and economic crime are widespread in most candidate countries.

- Trafficking in women and children is a growing problem in certain candidate countries, despite legal prohibition. Candidate countries have become countries of origin, transit (see case on Poland as transit country below), and destination (final embarkation). Significant efforts (the Enlargement Strategy Paper also mentions "vigorous measures") are still required to prevent such trafficking.

Other issues frequently mentioned include the data protection regime (requirements with regard to the Schengen Information System and Europol), and the national infrastructure in law enforcement organisations and immigration services (telecommunication, infrastructure at airports, Schengen teams and operational powers, etc.). When drawing up an inventory of regulatory instruments and policies in separate candidate countries, impressions seem to vary³³:

BULGARIA	Significant efforts are still required despite new regulatory instruments, modernisation of equipment, and demilitarisation of the police. The overall assessment includes: Data Protection Law to be adopted which is in line with the <i>acquis</i> ; despite alignment of its visa-regime with the EU there is still visa-free movement with e.g. Russia, Georgia and Ukraine; re-admission agreements to be concluded with UK and Ireland; Bulgaria receives few refugees; family reunification regulation needs to be brought in line; national information system compatible with SIS to be established; further training police professionals required in the field of human rights; police equipment to be modernised; overall strategy against drugs required; difficulties with mutual legal assistance in criminal matters; weaknesses in regulations concerning money laundering; interagency co-operation to be improved.
ESTONIA	1981 European Convention on Data Protection still to be ratified; visa practice to be professionalised (visa sticker and electronic data-exchange); common border controls system to be introduced (border controls are however rather efficient); considerable reinforcement of <i>acquis</i> in the field of migration required; alignment with Dublin Convention on Asylum required; police and law enforcement still rather weak in fight against organised crime (upgrading of techniques required); further legislative changes required to combat fraud and corruption; understaffing of Financial Intelligence Units is a problem; liaison officer to be seconded to Europol or other international organisations.

³³ The basis of this inventory is formed by the various Progress Reports 2000 (<http://www.europa.eu.int/comm/enlargement/index.htm>).

LITHUANIA	Ratification of European Convention on Data Protection required; independent supervisory authority to be established; visa policy very far in line but liberal visa regime with Kaliningrad and Belarus is seen as a problem; border control is efficient but further training of border and police officials required; understaffing of Migration Department is a problem; police training in specific crime fields required plus preparation of Lithuania's partnership of Europol; lack of co-ordination is a major shortcoming in fight against corruption; efficient structures for judicial co-operation will have to be established at central level.
ROMANIA	New regulatory instruments have been adopted but without much consultation; legal approximation and strengthening administrative capacity need further attention; ratification of CoE convention on data protection required; visa system to be aligned; as far as border control is concerned, equipment, infrastructure, interagency co-operation and training are to be improved; need to conclude more readmission agreements; police co-operation (e.g. sending liaison officers) is a problem because of lack of resources; in field of anti-fraud measures, Romania should prepare for co-operation with OLAF; extradition is a problem; UN Convention on Drugs and Psychotropic Substances still to be ratified.
CYPRUS	Despite legal alignment and strengthening administrative capacity, more effort is required for training and co-operation between agencies; border controls to be made further compatible with the Schengen requirements; legislation to counter marriages of convenience to be introduced; in the field of asylum, implementation capacity to be build in the form of Refugee Authority; computer network for customs to be improved; alignment with the <i>acquis</i> – specifically regarding criminalisation of membership of a criminal organisation – further required.
HUNGARY	Basic provisions of the JHA <i>acquis</i> are in place, but little progress reported in the field of judicial co-operation; some visa exemptions to be tackled (e.g. with Cuba and Belarus); border management needs further investment, but also training and staffing are points of attention; further alignment in the field of migration required, specifically concerning the admission of 3d country nationals for the purpose of studying etc.; definition of organised crime to be introduced in domestic law.
MALTA	A reasonable level of alignment is reported; however, compared with the Schengen standards, the equipment is considered quite poor; law on personal data protection required before it can join Europol; more alignment required in the domain of anti-fraud and anti-corruption measures, including establishment of administrative facilities; alignment of Malta's visa policy is required, as well as ratification of a number of convention on civil and criminal justice co-operation.

SLOVENIA	With the exception of border control, the overall situation concerning alignment with and implementation of the JHA <i>Acquis</i> looks good. The green border with Croatia gives rise to concern; illegal immigration is seen as major challenge because Slovenia is a transit country.
CZECH REPUBLIC	Border controls, police co-operation and the fight against fraud are problem areas, though progress is reported in most other JHA-areas (e.g. signing of the CoE convention on data protection); border guards are understaffed, under-equipped and have no proper means of communication at their disposal; police structures are too weak to effectively combat illegal immigration and organised crime; drug-related crime remains significant problem (transit).
LATVIA	Ratification of data protection convention required; further professionalisation of the visa-system (also visa-transit system) to be completed; more co-operation and integrated approach necessary for border control; lack of adequate equipment and lack of focus on risk areas are problem in border control; further steps in alignment with Europol requirements to be taken; law enforcement agencies to be supported with central information capacity.
POLAND	Progress reported on alignment of the <i>acquis</i> , but further work is needed on strengthening the infrastructure; Poland is vulnerable to penetration of organised crime groups; illegal immigration numbers substantially reduced; border controls are sound at Polish-German border but need improvement elsewhere; in the field of asylum, Poland needs to ratify the Dublin Convention; 1981 CoE Convention on data protection still to be ratified; corruption remains important issue to be addressed; dramatic increase in economic crime reported; more co-operation between law enforcement agencies required; Poland remains strong drugs-producing and drugs-consuming country; progress urgently needed in the field of money-laundering.
SLOVAKIA	Progress reported in most areas except border control; ratification of the CoE Convention on data protection required; on-line system and central registration system for visas to be established; susceptibility to illegal immigration and therefore much emphasis on the quality of the border management system; further alignment with EU asylum law required, specifically in application of the term "safe third countries"; further measures in the fight against organised crime necessary.

The Subject of Security: A Moving Target

Moreover, candidate countries find it hard to achieve the required Schengen / JHA-standards because they are continuously confronted with shifting security patterns. Indeed, there is considerable concern within the EU Member States³⁴ that some applicant states are unable to tackle transit crime, organised crime and illegal immigration. Organised criminal networks are easily accommodated by fragile political and administrative structures. Bribes and corruption facilitate the inter-penetration of the "upper-world" by the "under-world". The current practice thus far has been that EU member states submit an annual situation report on the state of affairs concerning organised crime in their countries. As EU Member States are now beginning to adopt a new strategy towards organised crime – which is inspired by crime prevention methods and risk analysis – candidate countries should also be encouraged by the EU to perform a SWAT-analysis of their economies, transport-infrastructure, wage-patterns, and so on. Criminal networks often operate on the waves of opportunity-structures³⁵; their operating strategies include calculated risk (e.g. of interception of illegal transports) and push- and pull-factors. Meanwhile, the fight against illegal trafficking of human beings has become a lynchpin in the pre-accession strategy. In March 2001, the Swedish Presidency concluded an agreement concerning improved co-operation between EU Member States and the candidate countries to combat trafficking in human beings. It was agreed in the JHA-Council that it is necessary to bring the candidate countries into closer contact with the EU bodies for police and prosecution cooperation, Europol and Eurojust.³⁶

The example of transit-migration through Poland³⁷ is a very telling illustration in this regard. Transit-migration is defined as "migratory movements to one or more countries with the intention to migrate to yet another country of final destination. These intentions or plans can develop at any stage, from the

³⁴ See *Enlargement Strategy Paper*, Report on progress towards accession by each of the candidate countries, 2000, at p. 6; http://europa.eu.int/comm/enlargement/report_11_00/strat_en.pdf

³⁵ Criminologists argue that according to the crime opportunity theory, crime rates are determined by the convergence in time and place of pools of motivated offenders, suitable targets and insufficient informal and formal social control. Moreover, it is argued that the presence of large pools of motivated offenders explains the high crime rates in developing countries and those European countries in transition. Jan M. van Dijk, "Does Crime Pay? On the Relationships between Crime, Rule of Law and Economic Growth", in *Forum on Crime and Society*, Volume 1, No.1, February 2001, pp. 1-16, at p. 5.

³⁶ See website of the Swedish Presidency of the EU, http://eu2001.se/eu2001/news/news_read.asp?iInformationID=13041.

³⁷ *Trafficking in Migrants through Poland*, Nathalie Siron & Piet van Baeveghem, supervised by Brice de Ruyver, Tom Vanderbeken and Gert Vermeulen, Antwerpen/Apeldoorn, Maklu, 1999.

initial outset to any time while in transit, a process that can take a few days or several years."³⁸ A stage-wise migration can be caused by strict visa policies or migration measures. (A discussion which looms behind this issue is if "Fortress Europe" is a contributory factor in these surging illegal immigration trends). Researchers established that from 1989 onwards, Poland gradually developed into a major transit-country, apparently with a sharp rise after the collapse of the Soviet Union at the end of 1991.³⁹ Recently there has been a remarkable rise in (illegal) migration through Poland that originates in the Asian countries, in particular Sri Lanka, Afghanistan, Pakistan, Iraq, Bangladesh and India. An important share originates from the former Soviet Union (Armenia, Ukraine and to a lesser degree Russia). Migrants also continue to come from Romania, Bulgaria⁴⁰, the former Yugoslavia, and other Balkan countries. There is also a small proportion of Africans who travel through Poland. Among the destination countries are many EU Member States (Belgium, Denmark, France, the Netherlands, Sweden and the UK), but also Canada, the USA and Norway feature on the list. Poland has also increasingly been functioning as a transit country for trafficking in human beings, e.g. women from the Ukraine, Russia and the Baltic States are brought through Poland. There they are introduced into the prostitution-business, after which they are 'resold' to brothel-owners in EU countries, Switzerland and Israel. It is also observed by the researchers that from 1998 on, Poland seems to have lost much of its appeal as a transit country, and it is argued that the transit route may have shifted to the Czech Republic. This change is attributed to the fact that Poland introduced a more stringent Aliens Act (25 June 1997) and increased the efficiency of its border control.⁴¹

The case illustrates a number of interrelated trends. First, migration patterns are subject to rapid fluctuation, following economic and political changes in other regions. Second, migration is heterogeneous and multi-national

³⁸ International Organisation for Migration (IOM), *Transit Migration in Poland*, Budapest, MIP IOM, 1994, p. 2.

³⁹ Siron & Van Baeveghem, et al., 1999, p. 22.

³⁹ International Organisation for Migration (IOM), *Transit Migration in Poland*, Budapest, MIP IOM, 1994, p. 2.

⁴⁰ Siron & Van Baeveghem, et al., 1999, p. 43, however also claim that for (trafficked) Romanians and Bulgarians, the Czech Republic is the most important transit-country towards Germany.

⁴¹ Siron & Van Baeveghem, et al., 1999, p. 23 and 24. At the same time, the researchers have established that Poland has a rather liberal visa policy, as some nationalities are exempted from a visa duty for a short term stay. Poland's liberal visa policy is considered an important difficulty in the accession process. Poland however does not seem prepared to impose a restrictive visa policy on its Eastern neighbour, as it would have a negative influence on the economic activities in the border regions. A high percentage of border crossings into Poland seem to be of a commercial nature. (ibid, p. 106).

in nature and follows interconnected chains that are unfolded on a global scale.⁴² If undertaken by criminal organisations, trafficking in human beings is just one criminal activity executed along others, such as kidnapping and abduction, trade in weapons, money laundering and corruption. These complicated, changeable and multi-national enterprises demonstrate the need for exchange of information and know-how between the EU-countries, the candidate countries and transatlantic states⁴³. The task to collect strategic analysis of crime phenomena is one of Europol's competences. To facilitate information-exchange with third countries, data-protection regimes of a number of candidate countries have been upgraded and screened (Hungary, Poland, Estonia, and Slovenia). Third, the shifting transit route from Poland to the Czech Republic reveals that there may be a negative drawback for an adjacent country if unilateral changes are introduced into national aliens' legislation. One may cautiously conclude that more lenient climates of legislation and law enforcement control contribute to rising illegal immigration and trafficking in human beings. It also shows that the scenario of differentiated integration into the EU Area of Freedom, Security and Justice, may stir up mutual tension between candidate countries. Fourth, the case illustrates that Poland and the Czech Republic have been forced into the role of the *cordon sanitaire* around the European Union, but that they cannot cut down illegal immigration movements as long as markets in Western Europe demand illegal labour and prostitution.

A concern strongly emphasised by Alina Mungiu⁴⁴ is that law enforcement and the judiciary are having to cope with *outdated equipment and poor facilities*. Compared to the sophisticated instruments of organised criminal networks – financed by huge illegal profit – law enforcement organisations in several candidate countries (especially from East Europe) are rather disadvantaged. The following quotation from a report from the Polish Border Guard makes this painfully clear:

⁴² See *Discussion Paper on prevention of trafficking in human beings*, European Commission, DG Justice and Home Affairs, First Meeting of the EU Forum on the prevention of organised crime, 17/18 May 2001, Brussels (http://europa.eu.int/comm/dgs/justice_home/index_en.htm).

⁴³ Several initiatives have already been established, e.g. regular meetings between CIREFI experts and experts from the Central and East European countries, and their participation to the data-exchange relating to illegal immigration. CIREFI also proposed in 1999 that the candidate countries participate in an early warning system for the transmission of information on illegal immigration and facilitator networks. During the Finnish Presidency, at a meeting in Turku, an initiative was launched to establish a European Centre for Monitoring Illegal Migration and Trafficking in Human Beings.

⁴⁴ Alina Mungiu-Pippidi, *Europe's 'Desert of Tartars' Challenge: The Borders of the Enlarged European Union*, paper presented at Reflection Group ("Diversity and Unity in the Enlarged European Union"), chaired by J.-L. Dehaene, 21-22 June 2001, Brussels.

"They (criminal groups with international relations that carry out illegal migrant transfer through Poland, mdb) possess big financial means, high-class communication equipment, exact maps, the latest noctovision equipment, fast cars, and security. They commission their assistants to monitor the area and border protection system and to find places adequate for illegal transfer."⁴⁵

Moving away from these factual accounts, it may be observed that a repetitive element in the accession negotiations seems constituted by a rather functionalist logic which builds on the ideology that nation states should continue to monopolise migration and market control. However - although not accepted as the official view - in an era of post-sovereignty politics and globalisation, this ideology is under severe strain. Although economies are increasingly becoming 'denationalised', governments continue to govern on the basis of national goals and frontiers⁴⁶, and it is precisely this sovereignty ambition that is being imposed on candidate countries as the prevailing logic of control, management and assessment. Candidate countries, especially those situated in the Baltic and Central and East Europe, are landed in a catch-22 situation, as they encourage the growth of liberal market economies on the one hand, but are faced with the simultaneous demand to introduce protectionist measures on the other.

'Big Bang' versus Flexibility in Schengen and JHA: A Contested Issue

As far as the Schengen *acquis* is concerned, it has been noted that Article 8 of the Schengen Protocol does not allow the candidate countries to adopt and implement the Schengen *acquis* in a gradual manner, unlike the United Kingdom and the Republic of Ireland, which managed to negotiate an opt-in clause at Amsterdam. This situation results in the highest standards set for candidate countries while current members of the EU are allowed to implement these requirements at their own pace.⁴⁷ Helen Wallace comments upon this derivation as follows:

"On the other hand, blindness (whether wilful or ignorant) about the problems of borders in Central and Eastern Europe entrenched an extraordinarily rigorous insistence in the Amsterdam text that new members must take Schengen commitments on 'in full', whatever the nature of the prior border regime with neighbouring countries not joining the EU. Here we should note the difficulty of understanding the reasons for, and the consequences of, exceptionalism already influencing practice ahead of ratification of Amsterdam and ahead of Eastern enlargement. As examples we should note the delicacy of Hungarian border relations with several of its

⁴⁵ Siron & Van Baeveghem, et al., 1999, p. 34.

⁴⁶ Elspeth Guild, "Primary Immigration: The Great Myths", in Elspeth Guild and Carol Harlow (Eds.), *Implementing Amsterdam. Immigration and Asylum Rights in EC Law*, Oxford, Hart Publishing, 2001, pp. 65-94, at p. 68.

⁴⁷ Anderson et al., 2001, see note 29 *supra*.

neighbours, and the adverse results of Poland's imposition of stronger controls over free movement of persons from Belarus and Ukraine under pressure from the EU."⁴⁸

This negative judgement is being joined by the gradual acknowledgement that a simultaneous fulfilment of the Schengen / JHA-criteria may not be achievable for all candidate countries. If a simultaneous integration of these countries proves impossible, it is acknowledged that a differentiated integration (e.g. stage-wise abolition of border controls) may cause tension between various countries, to the extent that their inhabitants are enjoying a liberal border-crossing regime which may have to be replaced by toughened border controls. Saryusz-Wolski - who characterises the opt-in clauses of the Schengen Protocol as "preposterously framed derogations" for some EU members⁴⁹ - argues that some flexibility should be granted by the EU, but that a strict application of the Schengen Protocol in principle would not allow for keeping the special arrangements that some of the candidate countries have with their neighbours. His argument seems to apply less to the application of flexibility in the enlargement process, than on the sensitivity of creating a new 'hard border' between the EU and neighbouring countries in East Europe. One aspect we should be mindful of is that the EU has significantly upgraded mechanisms monitoring the implementation of the Union *acquis* in justice and home affairs; moreover, both the member states and the Commission have adopted the view that the formal legal enactment of the Union *acquis* by the applicant countries will not adequately guarantee also an effective implementation. Meanwhile, the Collective Evaluation Group under the supervision of COREPER has been made responsible for evaluating the enactment, application and effective implementation of the Union *acquis*.⁵⁰

In contrast to the 'big bang requirement for candidate countries, differentiation has been widely practised within the European Union. Introduced as a 'mechanism for permanent differentiation'⁵¹, flexibility has become an irrevocable process within the AFSJ⁵². We have already seen that within the

Amsterdam Treaty on European Union, application of this principle can be witnessed in various outfits and qualities, for instance in the form of (partial) opt-outs (Title IV), opt-in clauses (Schengen Protocol), internal security clauses (Title IV), temporary provisions on the applicable decision-making system (Title IV), reinforced co-operation provisions (Title VI), "rolling ratification" (Title VI), and a facultative agreement concerning the jurisdiction of the European Court of Justice (Title VI). Flexibility also emerges in the form of protocols and declarations which are appended to Title VI Conventions. Moreover, flexibility and differentiation are a common good within certain Conventions: the Schengen Implementing Convention provides differentiated arrangements for bilateral cross-border law enforcement activities (hot pursuit and other competences).

Hence, within AFSJ, flexibility has been widely applied to accommodate the differentiated interests of the EU Member States.⁵³ Indeed, it seems that "Implementing the ToA involves, among other things, implementing a form of free movement which is differential to an unprecedented degree."⁵⁴ Differentiated implementation seems particularly interrelated with a double logic which is the undercurrent of Europe's migration policy: on the one hand, the free movement of people has been embraced as a leading engine of European integration and as an encouragement of labour mobility; on the other hand, the free movement of people is seen as difficult to control and is hence become subject of "securitisation".⁵⁵ From this, it appears concept of migration itself can be regarded as migratory, as it is subject to continuous shifts and changes. In trying to combine freedom for some and restriction for others, "the edifice is fundamentally unstable".⁵⁶

⁴⁸ In Neunreither and Wiener, 2000, p. 185.

⁴⁹ Jacek Saryusz-Wolski, "The reformed European Union and the challenge of enlargement", in Jörg Monar and Wolfgang Wessels, *The European Union after the Treaty of Amsterdam*, London and New York, Continuum, pp. 56-69, at p. 63.

⁵⁰ Monar, *Justice and Home Affairs in a Wider Europe*:..., 2000, on p. 16 and 17.

⁵¹ Alexander C.-G. Stubb disentangles the 'plethora' of terms used in this context, in "Negotiating Flexible Integration in the Amsterdam Treaty", in Karlheinz Neunreither and Antje Wiener (Eds.), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy*, Oxford, Oxford University Press, 2000, pp. 153-174, at p. 172 and 174.

⁵² Jörg Monar, *Justice and Home Affairs in a Wider Europe: The Dynamics of Inclusion and Exclusion*, Working Paper 07/00, "One Europe or Several?", ESRC Research Programme, on p. 6; see also Monica den Boer, *Taming the Third Pillar: Improving the Management of Justice*

and Home Affairs Cooperation in the EU, Maastricht, European Institute of Public Administration, 1998, p. 35ff.

⁵³ Wallace, *supra*, note 9.

⁵⁴ John Crowley, "Differential Free Movement and the Sociology of the 'Internal Border'", in Elspeth Guild and Carol Harlow (Eds.), *Implementing Amsterdam. Immigration and Asylum Rights in EC Law*, Oxford, Hart Publishing, 2001, pp. 13-33, at p. 32.

⁵⁵ Guild, *supra*, note 46, observes that: "The European Union has enjoyed a rather tortured relationship with primary economic immigration over the last ten years at least. While on the one hand it has sought to improve labour mobility among the Member States on the grounds that primary migration improves prosperity, it has maintained a discourse against primary economic immigration from outside the Union.", at p. 65.

⁵⁶ Crowley, 2001, *supra* note 54, at p. 32.

Are we, then, heading for a patchwork Europe? Exclusion from the expanding internal security zone may act as an incentive⁵⁷ to the candidate countries to rapidly succeed with the implementation of Schengen and JHA requirements. At the same time, the allowance of flexibility and diversity within the EU has "clearly shown the current applicant countries that the EU has ceased to move ahead as a unitary actor in the areas of justice and home affairs."⁵⁸ As such, the "credibility of the EU's insistence on the applicant countries taking over the whole of the EC/EU *acquis* has clearly suffered."⁵⁹ From the viewpoint of enhancing the functional effectiveness of the emerging Area of Freedom, Security and Justice and the political desirability of its legal, structural and political coherence, diversity – flexibility – should be suppressed, opines Jörg Monar. However, on the short term, the most important concern is to keep the momentum of the enlargement process going, now that public support inside and outside the European Union is beginning to wane. One of the crucial levers of negative public opinion in the applicant states may be situated in the experience of asymmetry, which may be encouraged by the disallowance of a gradual implementation of the Schengen *acquis*.

Practice What You Preach?

Perhaps the "Big Bang" scenario, which is accompanied by the requirement to have implemented the JHA *acquis* at once, is not such a persistent enlargement ideology after all. The logic of differentiation is beginning to creep into the negotiations with the candidate countries. Three forms of flexibility seem to apply.

First, in accordance with the guidelines for the negotiations approved by the Luxembourg European Council and confirmed by the Helsinki European Council, each candidate proceeds at its own speed, depending on its degree of preparedness. Each candidate is assessed on its own merits and will join the EU when it is able to meet the obligations of membership.

Second, heading towards the end of the enlargement negotiations, transitional measures are allowed – but only in well-justified cases – whereby the application or part of the *acquis* is delayed for a specific period.

Third, a differentiation strategy recently adopted relates to the tackling of the free movement of persons. After Austria and Germany exercised heavy

pressure to impose labour restrictions on neighbouring ex-communist states in Central and East Europe⁶⁰, Hungary accepted a transitional phase of 2 to 7 years before the EU borders will be opened up for Hungarian workers. Likewise, Hungary obtained the reciprocal right to impose restrictions on workers from the EU.⁶¹ Hence, a multi-speed process has been heralded with the assurances of the Netherlands and Sweden that they will admit Hungarian workers upon Hungary's accession to the EU. Other Member States are likely to follow.

If flexibility will indeed become the new accession norm within the context of the JHA chapter, the question that presents itself is whether candidate countries perceive differentiated integration into the AFSJ as a competitive and pejorative process. Now that the door has effectively been opened for differentiated integration and multi-speed accession to the EU, new challenges are beginning to emerge: except for the quality of external border controls, the quality of internal border controls between two or more candidate countries demands a lot of attention. Some candidate countries have already taken the initiative themselves to implement a phased process of border management: the Czech Republic declared that it can implement the *Acquis* by 1 January 2003, but it has demanded a transitional period for the border management of its international airports.

Conclusion

Throughout this paper, we have established that there are several contrastive pairs which constitute pointers in the enlargement discourse concerning the assimilation of the JHA *acquis*. Included in those are: sovereignty versus solidarity, symmetry versus asymmetry, uniformity versus differentiation, implementation at once versus multi-speed integration, standardisation versus tailor-made solutions, widening versus deepening, trust versus distrust, and fixation versus fluctuation. Within the context of this paper, only two of those have been carved out for further analysis, in particular the pairs "uniformity versus differentiation" and the "implementation-at-once" versus the scenario of "implementation-at-once". At the time of writing, the Commission is still on the tack of the "big-bang-scenario", where candidate countries will have to implement and operationalise the Schengen *acquis* at once upon their accession to the EU.

⁶⁰ A major concern in Austria and Germany is that immigrant labour from former communist countries will cause a nationalist backlash among their own voters; these fears seem to be particularly acute in Germany as it will have parliamentary elections next year.

⁶¹ Hungary achieved a major breakthrough in the negotiations concerning free movement of people, which places it in the vanguard together with Cyprus, and ahead of other frontrunners like Slovenia and the Czech Republic. *De Volkskrant*, 13 June 2001; see also *JAI in the News*, June 12.

⁵⁷ Jörg Monar, *Enlargement-Related Diversity in the EU Justice and Home Affairs: Challenges, Dimensions and Management Instruments*, WRR (Scientific Council for Government Policy), The Hague, December 2000, p. 16-17.

⁵⁸ Jörg Monar, 2000, p. 12.

⁵⁹ Idem, *supra* fn. 58..

Several questions remain for the future, and these are also subject to debate in other forums. An issue rarely brought forward is if the current JHA Acquis is able to cope with the challenges brought forward by the enlargement process itself. Whilst the policy-domain of EU police and justice co-operation in criminal matters is experiencing a serious move towards *deepening* and institutionalisation (e.g. in the form of operative powers for Europol, the establishment of Eurojust and the European Police College, more pragmatism in the form of mutual recognition of legal decisions), the JHA *acquis* needs to show a capacity of *widening*, in the sense that it needs to be flexed in a "horizontal manner" as well. Substantial elements of the JHA *acquis* may have to be re-addressed in the light of enlargement, such as the EU Action Plan against Organised Crime. More anticipation is also required with regard to the interpretation and application of the 'Amsterdam' provision on reinforced co-operation:

"In an enlarged EU, what role in criminal law enforcement has bilateral co-operation and reinforced co-operation between a limited number of member states? Are there new areas in which the candidate states would seek and profit from closer co-operation with member states? Is there a Gibraltar precedent – i.e. despite Article 32 (1) (g) of the TEU, a state has blocked the participation of another member state in Schengen?"⁶²

Moreover, the current JHA framework of instruments of control breathes a spirit of uniformity: by demanding the candidate countries to implement this *acquis*, a form of approximation or even harmonization is introduced implicitly between these countries. A pertinent question is whether the JHA *acquis* – in its current outfit – can be considered as legally consistent and uniform. One aspect of the executive law-making culture that has dominated the legislative process in Title VI, is that no specialized EC/EU lawyers establishes whether the legal instrument fits the already existing *acquis*.⁶³

Until now, the screening procedures and the communication of "best practices" have very much been a one-sided process, in the sense that there seems to be considerable asymmetry between the EU member states and the lesser-resourced East and Central European candidates. Arguably, more attention ought to be devoted to masterminding a scenario which stimulates reciprocity in the exchange of innovative practices, e.g. within law enforcement circles. Introducing more symmetry may remove some of the resistance against

accession to the EU now felt in some of the candidate countries. Indeed, the implementation of the JHA and Schengen *acquis* should not be fixated on techniques of control at the border, but should aim to reach beyond it:

"to develop active engagement and partnership with the new eastern neighbours; to support their economic development, socio-political stability and administrative capacities; and to respect the close historical, ethnic and economic ties between states beyond the EU's eastern borders and the new member states."⁶⁴

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⁶² Malcolm Anderson and Joanna Apap, "Justice and Home Affairs in an Enlarged European Union", paper presented at CEPS/Stefan Batory Foundation seminar, Warsaw, 23 and 24 February 2001 (*mimeo*).

⁶³ It should be noted, however, that the Legal Service of the Council performs such a check on Title VI instruments.

⁶⁴ Reflection Group on the *Long-Term Implications of EU Enlargement*, 1999, on p. 8 (<http://www.iue.it/RSC/pdf/FinalReport.pdf>).